



AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Chapter 7

RIN 0412-AA98

U.S. Agency for International Development Acquisition Regulation (AIDAR): Revised and Expanded Fringe Benefits for U.S. Personal Services Contracts with Individuals

AGENCY: U.S. Agency for International Development.

ACTION: Proposed rule.

SUMMARY: The U.S. Agency for International Development (USAID) seeks public comment on a proposed rule to revise AIDAR in order to expand fringe benefits for personal services contracts with individuals who are U.S. nationals (USPSCs). Specifically, this rulemaking will provide a paid parental leave benefit comparable to what is available to USAID's U.S. direct-hire employees and provide a relocation expense reimbursement similar to the benefit provided to USAID's direct-hire Foreign Service Officer (FSO) employees.

DATES: Comments must be received no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Address all comments concerning this proposed rule, identified by title of the action and Regulatory Information Number (RIN), through the Federal eRulemaking Portal at <http://www.regulations.gov> by following the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Richard E. Spencer, Procurement Analyst, by phone at 202-916-2629 or via e-mail at policymailbox@usaid.gov for clarification of content or information pertaining to status or publication schedules. Communications regarding this rule must cite the rule title and its Regulatory Information Number (RIN).

SUPPLEMENTARY INFORMATION:

I. Submission Instructions

Comments on this proposed rule must be in writing and submitted by the method specified in the **ADDRESSES** section above. Comment submissions must include the title and

RIN of this proposed rule. Please include your name, title, organization, postal address, telephone number, and email address in the text of the message.

All comments will be made available for public review at <https://www.regulations.gov> without changes, including the identifying information of the commenter, if provided. We recommend that commenters do not submit information that is considered confidential business information (CBI) or any information that is otherwise protected from disclosure by statute.

USAID will only address substantive comments on the rule that are relevant and within the scope of the proposed rule.

II. Background

USAID relies heavily on the USPSC mechanism to advance its foreign assistance mission and mandate. Approximately ten percent of USAID's total workforce is USPSCs, of which about half perform under contracts where the place of performance is a USAID cooperating country abroad. The PSC Association, an Agency employee resource group representing USAID USPSCs, raised concerns to USAID's leadership about the equity of fringe benefits between U.S. direct-hire employees (USDH) and USPSCs. As a result, USAID has determined, as a matter of policy, to revise the AIDAR to provide the following changes as part of the Agency's standard USPSC fringe benefits package.

A. Paid Parental Leave

On December 20, 2019, the President signed the National Defense Authorization Act (NDAA) for Fiscal Year 2020, which includes the provisions of the new Federal Employee Paid Leave Act (FEPLA), making paid parental leave available to certain categories of Federal civilian employees. (Pub. L. 116-92.) FEPLA amended the Family and Medical Leave Act (FMLA) provisions in Title 5, United States Code (U.S.C.) to provide up to 12 weeks of paid parental leave to covered Federal employees in connection with the birth or placement (for adoption or foster care) of a child occurring on or after October 1, 2020. Paid parental leave granted in connection with a qualifying birth or placement under FEPLA is substituted for

unpaid FMLA leave and is available during the 12-month period following the birth or placement. This particular benefit does not apply to contractors, including personal service contractors, of Federal agencies.

The Department of State (DoS) recently revised its policies in the Foreign Affairs Manual (3 FAM 9116) to authorize, as a matter of policy, paid parental leave for its USPSCs based on Title 1 of the Family Medical Leave Act (28 U.S.C. 2601). In USAID's meetings with the PSC Association earlier this year, Agency leadership indicated its intention to pursue several improvements to benefits for USPSCs, including paid parental leave.

On October 1, 2021, the USAID Administrator approved, as a matter of Agency policy, the provision of a similar paid parental leave benefit for USAID USPSCs to serve as an indicator of the Agency's commitment to equity for USPSCs. Eligible USPSCs may be granted up to 12 workweeks (using the term "workweek" as described in appendix D, section 12, clause 4) of paid parental leave in connection with the birth of a child, or a new placement of a child for adoption or foster care, for which the USPSC assumes a parental role. USAID's paid parental leave benefit for its USPSCs is based on (1) the paid parental leave benefit provided to certain categories of Federal civilian employees under the FEPLA, and (2) the paid parental leave benefit policy that the Department of State (DoS) recently approved for its American personal service contractors.

B. Relocation Expense Benefit.

In its discussions with the Agency, the PSC Association raised a concern that "USPSCs are not eligible for the Foreign-Transfer Allowance (FTA) and Home-Service Transfer Allowances (HSTA) and yet incur the same costs as Foreign Service Officers (FSOs) when moving from one post of assignment to another." The PSC Association requested that the Agency "[allow] these costs to be included in the Travel Authorizations of USPSCs [who are] moving between posts (or to/from Washington) when their contracts are consecutive."

In accordance with 5 U.S.C. 5924(2), an employee assigned to a foreign area may be granted a transfer allowance. Using this authority, USAID grants FTA and HSTA to its direct-hire employees under its policies in Automated Directives System (ADS) 477, particularly FSOs, following Department of State Standardized Regulations (DSSR) 240 and 250 respectively, to offset expenses incurred by the employee incident to establishing oneself at any “post of assignment” abroad, or back in the U.S. for a new assignment after returning from a post abroad, subject to the employee fulfilling a requirement for continued service.

Based on the applicable definition of “employee” in 5 U.S.C. 5921(3), the Agency determined that USPSCs are not entitled to these allowances. The AIDAR has never authorized a benefit analogous to the FTA, HSTA, or any similar allowance in DSSR for USPSCs, because the Agency does not transfer a USPSC to another Mission under a directed assignment, unlike FSOs who are subject to worldwide availability and are thus required to move as a condition of continued employment.

In October 2020, USAID’s Acting Administrator exercised the Agency’s policy discretion to authorize the creation of a “relocation expense” benefit, as proposed by this rule, that mirrors applicable elements of the FSO transfer allowances. The proposed relocation expense benefit addresses two of the four portions of the FTA that the Agency has adapted appropriately to the PSC mechanism: (1) the miscellaneous-expense portion; and, (2) the pre-departure subsistence portion (similar to Sections 242.1 and 242.3 of the DSSR, respectively). The miscellaneous expense is a flat amount, calculated based on family size, to offset common relocation expenses such as are identified and estimated in the DSSR. The subsistence portion offsets temporary lodging costs incurred for up to 10 days before travel to post, using per-diem rates based on the U.S. locality of the USPSCs legal place of residence.

There are two contexts in which persons will be eligible for the two portions of the USAID USPSC relocation expense benefit: (1) an individual located in the U.S. who enters into a new contract for 12 consecutive months or more of continuous service abroad qualifies for both

the miscellaneous and pre-departure subsistence expense portions (paragraphs (a) and (b) of the proposed regulatory text); and (2) a contractor currently performing services abroad as a USAID USPSC who undertakes a new, 12-month minimum USPSC contract for continuous service abroad at a different Mission immediately following their current contract qualifies only for the miscellaneous expense portion (paragraph (a)). The relocation benefit will not be authorized for USPSCs who are returning to the U.S. for a new USPSC contract with USAID because the Agency does not pay relocation costs for any new position in the U.S. under any of its staffing mechanisms.

The Agency determined that the principal rationale for the relocation benefit for USPSCs is equity between its USDH employees and USPSCs. Thus, the change in policy will provide USPSCs with a relocation benefit that is similar to that received by USAID's USDH to the practicable extent possible. USAID's provision of this benefit will establish a precedent among other U.S. Government departments and agencies that also contract for personal services.

III. AIDAR Changes

A. Paid Parental Leave

This proposed rule will revise appendix D, section 12, clause 5, "Leave and Holidays," specifically to update the provision of family and medical leave to allow for any prior federal service to align with the provision of paid parental leave, and to add a separate new paragraph for the provision of paid parental leave itself.

B. Relocation Expense Benefit

AIDAR appendix D contains the Agency's standard contract terms and conditions for USAID's USPSCs, and this proposed rule amends section 12, General Provisions, with a new clause to provide the relocation expense fringe benefit authorized for USPSCs abroad.

IV. Regulatory Considerations and Determinations.

A. Executive Orders 12866 and 13563

This proposed rule has been drafted in accordance with Executive Orders (E.O.s) 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equality). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. USAID has reviewed the regulation to ensure its consistency with the regulatory philosophy and principles set forth in E.O.s 12866 and 13563, and determined that addressing the Agency's workforce equity concerns justifies the cost impacts of the changes proposed by this rule. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

B. Expected Cost Impact on the Public

As a regulatory matter, the cost of the rule-making process to incorporate these revisions into the regulation is also justified. The AIDAR's appendices include all the compensation and benefits available to personal services contractors. Therefore, the Agency needs these revisions to keep the regulation consistent, complete, and transparent to industry, other U.S. Government agencies, and the general public.

There are no costs to the public associated with this rulemaking. The Agency's direct costs for each benefit proposed by this revision is as follows:

1. Paid Parental Leave (PPL)

It is estimated that the average annual incremental cost to the Agency to provide the PPL benefit is \$1.2 million starting in Year 1. This estimated cost assumes a base of 1,193 USPSCs and, over a 10-year period, an average of 47 USPSCs will make use of the PPL benefit each year. It further assumes each of the 47 USPSCs will take full advantage of 12 weeks of PPL paid leave for an average approximate cost of \$25,600 per USPSC. The annual increase in cost to the Agency of providing the PPL benefit is 2.70% of the previous year's dollar cost. This 2.70%

increase is a function of the assumed annual growth in the number of USPSCs and their salary and benefits.

2. Relocation Expense Benefit

The costs calculated for this benefit are based on upper end estimates to illustrate the potential impact of this added fringe benefit. The estimated average Year 1 cost to the Agency for the proposed relocation benefit, based on 537 USPSCs performing abroad, is \$1.29 million. The estimated average cost over a five-year period is \$6.45 million.

C. Regulatory Flexibility Act

The Director of the Office of Acquisition and Assistance in USAID's Bureau for Management, acting as the Head of the Agency for purposes of the Federal Acquisition Regulation (FAR), certifies that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Consequently, the Agency has not prepared a regulatory flexibility analysis.

D. Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission to OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required.

List of Subjects in 48 CFR Chapter 7 Appendix D

Government procurement.

For the reasons discussed in the preamble, . USAID proposes to amend 48 CFR chapter 7 as follows:

CHAPTER 7— AGENCY FOR INTERNATIONAL DEVELOPMENT

1. The authority citation for 48 CFR chapter 7, appendix D, continues to read as follows:

Authority: Sec. 621, Pub. L. 87-195, 75 Stat. 445, ([22 U.S.C. 2381](#)) as amended; E.O. 12163, Sept. 29, 1979, [44 FR 56673](#); 3 CFR, 1979 Comp., p. 435.

2. Amend appendix D to chapter 7 as follows:

a. In sections 10 and 11, add provision number 30 to the list of General Provisions in the contract formats;

b. In section 12, under the Index of Clauses, add provision number 30;

c. In section 12, under General Provision number 5:

i. In the first sentence of paragraph (h), remove the word “under” and add in its place the words “consistent with”;

ii. Revise paragraph (i)(3);

iii. In the fourth sentence of paragraph (i)(5), remove “CO” and add in its place the words “contracting officer”;

iv. Redesignate paragraph (j) as paragraph (k); and

v. Add new paragraph (j); and

d. In section 12, add provision number 30.

The revisions and additions read as follows:

Appendix D to Chapter 7—Direct USAID Contracts with a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad

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10. *Form USAID 1420-36, “Cover Page” and “Schedule”.*

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General Provisions:

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30. Relocation Expense

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11. *Optional Schedule With a U.S. Citizen or U.S. Resident Alien*

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General Provisions:

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30. Relocation Expense

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12. *General Provisions for a Contract With a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad*

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Index of Clauses

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30. Relocation Expense

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5. Leave and Holidays (NOV 2020)

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(i) * * *

(3) In accordance with 29 CFR 825.110, to be eligible for family and medical leave, the contractor must have--

(i) Been employed or under contract for at least twelve (12) months with a U.S. federal agency as a direct-hire or a personal services contractor; and

(ii) Performed at least 1,250 hours of service with a U.S. federal agency as a direct hire or a personal services contractor during the previous 12-month period immediately preceding the commencement of family and medical leave.

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(j) *Paid Parental Leave.* (1) If the contractor is eligible for family and medical leave in accordance with paragraph (i) "Family and Medical Leave" of this clause, then instead of family and medical leave, the contractor may be authorized to take paid parental leave as specified in this paragraph, similar to that provided to USAID direct-hire employees. When authorized to do

so by the contracting officer, the contractor may elect to substitute paid parental leave for up to twelve (12) workweeks of family and medical leave, as specified in paragraph (i) of this clause. The contractor may take such paid parental leave after the occurrence of the birth or placement of a child which results in the contractor assuming and continuing a parental role with respect to the newly born or placed child in accordance with the requirements of this paragraph (j).

(2) Paid parental leave may be taken intermittently or on a reduced leave schedule, subject to the mutual agreement of the contractor and their supervisor. Paid parental leave must be used no later than the end of the 12-month period beginning on the date of the birth or placement involved. At the end of that 12-month period, any unused balance of paid parental leave expires and is not available for future use. No payment will be made for unused or expired paid parental leave. Paid parental leave is not annual leave, and thus will not be included in any lump-sum payment for annual leave following completion or termination of the contract.

(3) To establish eligibility for paid parental leave, the contracting officer may require the contractor to provide documentation of entitlement and a signed certification. Appropriate documentation of entitlement is to show that the contractor's use of paid parental leave is directly connected with a birth or placement that has occurred, such as a birth certificate or a document from an adoption or foster care agency regarding the placement. By the signed certification, the contractor is attesting that the paid parental leave is being taken by the contractor in connection with the documented birth or placement, and that the contractor has a continuing parental role with respect to the newly born or placed child.

(4)(i) The contractor may not use any paid parental leave unless the contractor agrees in writing, before commencement of the leave, to return immediately after completing paid parental leave to continue performance under this contract for at least 12 workweeks. This 12-workweek period of performance obligation begins on the contractor's first scheduled workday after the contractor concludes taking such leave, whether taken consecutively or intermittently, regardless of the amount of leave taken. The period of performance obligation by the contractor is fixed at

12 workweeks regardless of the amount of leave used by the contractor. (ii) Due to this 12-workweek mandatory period of performance obligation, the contracting officer will not authorize paid parental leave for use by the contractor within the last 12 workweeks before the contract end date, including option periods if any, regardless whether exercised. Within the last 24 workweeks of the contract, because of the mandatory 12-week period of obligation, the contracting officer will only authorize paid parental leave for any time remaining before the contract end date beyond the 12-week mandatory period of performance. Any paid parental leave taken by the contractor as well as the 12-week period of performance obligation must be completed by the contract end date, including any option periods, regardless of whether exercised.

(iii) If the contractor is eligible for paid parental leave, but is physically or mentally incapable of entering into the period of performance obligation agreement before the period of leave, such leave may be temporarily authorized, or retroactively invoked upon return to duty, subject to a determination that, in the Agency's judgment, the contractor was incapable of entering into such agreement in accordance with the requirements of this paragraph at the time of the commencement of the leave entitlement.

(5)(i) If, during the period of paid parental leave or of the required 12-workweek period of performance obligation, the contractor learns, or decides, they will not be able or willing to complete the period of performance obligation, the contractor must notify their supervisor and contracting officer of the situation as soon as possible. After receiving such notice, the contracting officer will coordinate with the supervisor to determine whether reimbursement is required in accordance with this paragraph.

(ii) If the contractor fails to return to work for the required 12-week obligation, the Agency will require reimbursement from the contractor of an amount equal to the total amount of the Government contributions paid by the Agency to or on behalf of the contractor to maintain the contractor's health insurance coverage during the period of paid parental leave.

(iii) The contracting officer may waive the reimbursement requirement of this paragraph if the contractor is unable to fulfill the required 12-workweek obligation for any of the following reasons:

(A) in the Agency's judgment, the contractor is unable to return to work because of the continuation, recurrence, or onset of a serious health condition (including mental health) of the contractor or the newly born or placed child—but only if the condition is related to the applicable birth or placement; or

(B) in the Agency's judgment, the contractor is unable to return to work due to circumstances beyond the contractor's control that precludes performance under the contract; or

(C) the contracting officer terminates the contract for convenience in accordance with the clause entitled "Termination", or does not exercise any option period.

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30. Relocation Expense Benefit

[Insert the following clause in contracts with USPSCs based abroad except Resident Hire USPSCs.]

Relocation Expense Benefit (DATE)

If the contractor's period of performance abroad is for twelve consecutive months or more, USAID may provide a one-time payment to assist the contractor with extraordinary relocation expenses as follows:

(a) A contractor legally residing in, and relocating from the U.S., its commonwealth, possessions or territories to an overseas post; or a personal services contractor relocating immediately from a prior USAID overseas post to the USAID overseas post under this contract, may receive a miscellaneous relocation expense payment of—

(1) \$750 or the equivalent of one week's pay, whichever is the lesser amount, if the contractor is unaccompanied; or

(2) \$1,500 or the equivalent of two weeks' pay, whichever is the lesser amount, if the contractor is accompanied with eligible family members.

(b) In addition, a contractor legally residing in, and relocating from the U.S., its commonwealth, possessions or territories to the cooperating country pursuant to this personal services contract may receive a pre-departure subsistence expense reimbursement for the contractor and each eligible family member for up to 10 days before final departure to the cooperating country abroad, beginning not more than 30 days after the contractor has vacated their residence, using the following partial flat rate method:

(1) An actual lodging amount (excluding lodging tax) up to the lodging portion of the per diem of the U.S. locality of the contractor's legal place of residence, and a flat amount equal to the meal and incidental expense (M&IE) portion of the per diem according to the formula below. In addition, the contractor may be reimbursed separately for taxes imposed on actual lodging expenses, if any. Receipts are required only for lodging.

(2) For the initial occupant, whether the contractor or accompanying eligible family member age 12 or over, a daily lodging amount not in excess of the published lodging portion of the per diem rate for the U.S. locality at which the occupant normally resides, and a flat amount equal to the meal and incidental expense portion of the referenced per diem rate to defray costs for meals, laundry and dry cleaning.

(3) For each additional occupant, whether the contractor or accompanying eligible family member age 12 or over, a daily lodging amount not in excess of 75% of the published lodging portion of the per diem rate for the U.S. locality at which the occupant normally resides, and a flat amount equal to 75% of the meal and incidental expense portion of the referenced per diem rate to defray costs for meals, laundry and dry cleaning.

(4) For each accompanying eligible family member occupant under age 12, a daily lodging amount not in excess of 50% of the published lodging portion of the per diem rate for the U.S. locality at which the occupant normally resides, and a flat amount equal to 50% of the meal and

incidental expense portion of the referenced per diem rate to defray costs for meals, laundry and dry cleaning.

(5) A contractor and any accompanying eligible family member relocating from a place other than the U.S., its commonwealth, possessions or territories to the cooperating country, will not be eligible for the pre-departure subsistence expense portion of the relocation expenses.

(6) Expenses of local transportation are not allowable.

(c) The contractor must obtain approval for what is authorized in paragraphs (a) and (b) of this clause in the Travel Authorization (TA) issued by USAID to the contractor, in accordance with the Travel and Transportation Expenses clause. The contractor must claim reimbursement under the TA only after the contractor and all accompanying eligible family members, if any, have arrived in the cooperating country.

(d) If the contractor does not complete twelve consecutive months in the cooperating country, except for reasons beyond the contractor's control, the contractor will be liable to reimburse USAID for the amount of the relocation expense benefit received.

Mark Walther,

Chief Acquisition Officer.

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